In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1557

NACHMAN CORPORATION,

Petitioner,

v.

PENSION BENEFIT GUARANTY
CORPORATION and INTERNATIONAL
UNION, UNITED AUTOMOBILE
AEROSPACE AND AGRICULTURAL
IMPLEMENT WORKERS OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF PETITIONER
NACHMAN CORPORATION

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BRIEF OF PETITIONER NACHMAN CORPORATION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, 592 F.2d 947 (7th Cir. 1978), appears in the Appendix to the Petition for Certiorari. The opinion of the United States District Court for the Northern District of Illinois, granting summary judgment, which was reversed by the court of appeals, appears at 436 F. Supp. 1334, and is printed in the Appendix at p. 76. An earlier opinion of the district court, denying the PBGC motion to dismiss, is printed in the Appendix at p. 53.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 23, 1979. Jurisdiction of the courts below was based upon 28 U.S.C. §§ 1331 and 1339, and 29 U.S.C. § 1302(b). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an employer, which lawfully terminated a pension plan prior to the effective date of the minimum vesting and funding standards imposed by ERISA (hereinafter defined), is required to continue to fund a pension plan to provide payments to participants for which the employer was not contractually liable.

STATUTES INVOLVED

(Reprinted Verbatim In Addendum Hereto)

Statutes:

Internal Revenue Code of 1954 (26 U.S.C. 1964 ed.) [prior to amendment by ERISA]

Section 401(a)(2)
Section 401(a)(4)
Section 401(a)(7)
Section 402(a)(1)
Section 402(a)(2)
Section 404(a)

Internal Revenue Code (26 U.S.C., 1978 ed.) [after amendment by ERISA]

Section 410(a)(1)(A)(ii)
Section 411(a)(2)
Section 412(b)(3)

Title 29, United States Code:

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Section 1052(a)(1)(a()(ii)
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Section 1086(b)
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29 C.F.R. § 2605.6(a)

STATEMENT OF THE CASE

This declaratory judgment action[1] arises from the determination by respondent Pension Benefit Guaranty Corporation ("PBGC") that the Employee Retirement Income Security Act of 1974, 88 Stat. 929 (1974), 29 U.S.C. §§1001-1381 (1975) ("ERISA"), compels petitioner Nachman Corporation, an Illinois corporation ("Nachman"), to continue to fund a lawfully terminated collectively bargained pension plan despite contrary provisions in the Plan, including an express limitation of Nachman's liability.

The Plan at issue (hereinafter the "Nachman Plan" or the "Plan"), was established in 1960 pursuant to a collective bargaining agreement between Nachman and the International Union, United Automobile Aerospace & Agricultural Implement Workers of America (the "UAW"). In return for the services performed by its employees, Nachman, as part of a compensation package of wages, pension and other benefits, agreed to contribute to a pension plan a certain number of cents per hour worked for each employee. Under the Plan, Nachman's obligation to make annual contributions to a trust fund was translated into an actuarial formula calculated so that benefits based on current services were fully funded each year the Nachman Plan was in existence, and benefits based on service rendered before the Plan was adopted would not be fully funded unless the Plan was in existence 30 years.[2] As acknowledged by the Seventh Circuit, "The parties do not dispute that Nachman complied fully with the funding obligations imposed by the Plan."[3]

[1] Nachman filed a declaratory judgment action against the PBGC alone. The UAW subsequently intervened as a defendant. The case was decided on cross motions for summary judgment.

[2] Article IV § 2(a) of the Plan; App. 22-23.

[3] Appendix to Petition, p. 2 (The citations to the opinions below refer to the Appendix and Appendix to the Petition for Certiorari, rather than the published opinions.)

Eligibility to receive benefits under the Plan was based on age and seniority. Employees completing ten years or more of service who retired at or after age 65 were eligible to receive "normal" retirement benefits. The Plan also provided for various "early" retirement benefits for employees completing ten years who retired between ages 60 and 65, and employees completing 15 years who terminated between ages 45 and 60.[4]

The Nachman Plan expressly provided that the benefits payable to participants were conditioned on the sufficiency of the funds contributed by Nachman and the accumulated earnings thereon:

> "Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund. In the event of termination of th[e] Plan, there shall be no liability or obligation on the part of the Company to make any further contribution to the Trustee except such contributions, if any, as on the effective date of such termination, may then be accrued but unpaid."[5]

Under its terms, the Plan could be terminated, upon 90 days' notice, after the collective bargaining agreement expired.[6] The Plan also provided that upon termination, the contributions previously made by Nachman constituted a "complete discharge of the Company's financial obligation."[7] In addition, although the Plan provided that it could be amended to comply with changes in federal or state law, no modification or amendment was permitted which "would, in any manner, change the amount of contributions to be made by [Nachman]."[8]

The Plan also provided for a system of priority for the payment of benefits if the Plan was terminated and funds

[4] Article VII, § 1 of the Plan, App. 28.

[5] Article V, § 3 of the Plan, App. 24.

[6] Article X, §§ 1, 2 of the Plan, as amended, App. 31,52.

[7] Article IV, § 5 of the Plan, App. 23.

[8] Article IX, § 1(b) of the Plan, App. 31.

were distributed before it was fully funded. Those priorities allocated such funds as remained at termination to the employees based on age and seniority. To the extent no assets were available to fund the benefits of a specific age and seniority category, such benefits were to be forfeited.[9]

Prior to ERISA, the applicable provisions of the Internal Revenue Code (the "1954 Code") and Illinois law permitted tax-qualified pension plans to provide, and Nachman agreed to provide, that the plan could be terminated unilaterally and thereupon contributions would cease.[10] Benefits would then be paid to participants from the funds already contributed and for which the employer received a deduction on its income tax return. Only the benefits which were fully funded, and for which the employer had taken a tax deduction, were required to be nonforfeitable. This prevented such funds from reverting to the employer and insured that such funds would be paid to the employees.

Once fully implemented, ERISA established a number of requirements for plans to provide nonforfeitable benefits beyond those fully funded: after ERISA, certain benefits could not be forfeited due to early termination of employment or of the plan. In addition, minimum funding obligations were required to be undertaken by the employer under Titles I and II of ERISA and the PBGC was established by Title IV to insure the payment of benefits upon plan termination. ERISA did not, however, require a plan to provide these truly nonforfeitable benefits upon its enactment in 1974. Instead, the requirements to provide nonforfeitable benefits were phased in to allow employers time to plan appropriate courses of action to deal with the requirements of the new Act. See *Allied Structural Steel Co.* v. *Spannaus*, 483 U.S. 234, 249 (1978); *City of Los Angeles* v. *Manhart*, 435 U.S. 702, 721 (1978) (discussed at pp. 35-6, 39-40, infra).

[9] Article X, § 3 of the Plan, App. 32-33.

[10] Int. Rev. Code of 1954, ch. 1, § 401(a)(7); *Baake* v. *General American Trans. Corp.*, 351 F.Supp. 962 (N.D. Ill. 1972).

Thus, under Titles I and II of ERISA, every plan such as the Nachman Plan was required to be amended for plan years beginning on or after January 1, 1976 to provide that a participant's benefits become nonforfeitable after he completes a certain length of employment. 29 U.S.C. §§ 1053(a), 1061(b) (2). Nachman's first contribution to meet the new minimum funding requirements imposed by ERISA would have been for the plan year beginning January 1, 1976. 29 U.S.C. §§ 1082(b) (3), 1086(b).

Relying on this timetable, on October 1, 1975, Nachman, which was closing its Chicago plant due to unprofitable operations, gave timely notice to the UAW that it was terminating the Plan effective December 31, 1975. At that time, the assets of the fund established under the Plan were sufficient to pay all normal and a portion of the early retirement benefits (to employees of ten years or more who had retired at or after age 65, and to employees of ten years who retired between 60 and 65), but were insufficient to pay retirement benefits to those employees who terminated employment prior to age 60 and had not reached that age at the time the Plan terminated.[11] Nachman could not have terminated the Plan prior to October 31, 1975 because, under the provisions of the Nachman Plan, termination was not permitted during the term of the collective bargaining agreement which expired on that date.[12] As the court below acknowledged, "The propriety of the termination is not challenged."[13]

The effect of such termination on Nachman, however, is indeed challenged. Although the parties and the court below conceded that Nachman *could not* have terminated the Plan prior to October 31, 1975, and although Congress allowed

[11] App. 5, 71, 78.

[12] Article IX, § 2 of the Plan, as amended by Amendment No. 3 to the Plan, App. 31-32, 52.

[13] Appendix to Petition, p. 3.

a grace period to January 1, 1976 to amend such plans to provide nonforfeitable benefits and eliminate limitations on benefits such as those at issue in this case, the court of appeals (reversing the district court) found (1) that the benefits provided under the Plan, which were expressly conditioned upon sufficiency of Plan assets, were nonforfeitable under ERISA prior to 1976, and (2) that the express terms of the Plan had been retroactively amended by ERISA to impose liability for continued funding where no such liability had previously existed, even though the Plan was properly terminated before 1976. The court further held that such an interpretation did not violate the due process clause of the fifth amendment to the United States Constitution.[14]

The court held, first, that the definition of "nonforfeitable" contained in section 3(19) of Title I of ERISA (29 U.S.C. § 1002(19)) applies to the use of that term in Title IV, which governs the PBGC. This is important since Nachman is liable to the PBGC only for benefits which are nonforfeitable. A benefit or a claim to a benefit is "nonforfeitable" under Section 1002(19) only if it "is unconditional, and . . . is legally enforceable against the plan." Although the finding that the section 1002(19) definition applies to Title IV was in accord with the position taken by the district court and Nachman, the court of appeals held that the benefits at issue were "nonforfeitable" under the definition, despite the fact that those benefits were limited to Plan assets at termination.

Nachman timely filed its petition for certiorari and this Court granted that petition on June 18, 1979.

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[14] This Court, in granting certiorari, limited the issues to only the interpretive question.

SUMMARY OF ARGUMENT

Nachman's position in this action is grounded in logic and fairness. In 1960, Nachman and the UAW established the Nachman Plan, which contemplated that if the Plan existed for thirty years current benefits and those based on past services provided by the Plan would have been funded by Nachman's annual contributions. The Plan, which provided for termination by either party, was terminated after only fifteen years, resulting in Plan assets insufficient to fund the benefits for those employees who terminated employment before age 60.

Prior to the effective date of ERISA, employees and unions were permitted to include terms in plans which precluded liability by the employer for contributions beyond those bargained for and required during the plan's existence, and which limited recovery of benefits to the assets remaining at termination. Collective bargaining agreements could provide that an employer, as part of a wage package, would contribute a given amount each year to a pension plan and that, upon the plan's termination, its assets would pass to employees with greatest seniority. The Nachman Plan contained such provisions.

Titles I and II of ERISA required the elimination of such provisions for plan years beginning on or after January 1, 1976. Nachman properly terminated its Plan on December 31, 1975, before it was required to provide nonforfeitable benefits. At the time Nachman terminated the Plan, Title IV of ERISA was already in effect, establishing the PBGC to insure nonforfeitable benefits upon plan termination. Since the benefits provided in the Nachman Plan were conditioned upon sufficiency of assets at termination, and thus not nonforfeitable, the PBGC did not insure and Nachman was not liable for continued funding of these benefits.

The ruling below reached a contrary result because the court of appeals held that the benefits conditioned upon suffi-

cient funding were nonforfeitable, as that term is defined in Title I of ERISA. Since the PBGC insures nonforfeitable benefits at plan termination after June, 1974, and since employers are liable to reimburse the PBGC for all benefits insured for plans terminating after September 2, 1974, the court held that Nachman was liable to the PBGC for continued funding.

The court of appeals erred. The benefits were not nonforfeitable since they were expressly conditioned on the sufficiency of assets remaining in the Plan at termination. They were not "unconditional and . . . legally enforceable against the Plan," as required by the ERISA definition of "nonforfeitable." The PBGC was required to insure nonforfeitable benefits under the terms of a plan and the benefits under the terms of the Nachman Plan could and would be lost unless they were fully funded. So conditioned, they were not enforceable against either the Plan or the employer.

The plain language of the statute, the pre-ERISA law, and the legislative history of ERISA compel this conclusion. To hold otherwise would result in an immediate, retroactive imposition of liability to pay for past-rendered services, despite the clear congressional intent not to impose immediately such harsh burdens on employers, as evidenced by the grace periods provided in ERISA. Congress never intended, and this Court should not permit the result imposed by the decision of the court of appeals.

ARGUMENT

I

HISTORICAL PERSPECTIVE

Prior to the enactment of ERISA on September 2, 1974, the only statute which influenced the substantive provisions of pension plans was the 1954 Code. The 1954 Code and the regulations and rulings promulgated thereunder set forth the standards under which an employer could establish a retirement plan and receive a current income tax deduction for contributions thereto. The 1954 Code also provided that the income earned on the assets held by the plan would be income tax-free and employees would not be required to include any benefits in their income for tax purposes until they actually received payment.[15] Other than the 1954 Code, prior to ERISA, the common law of contracts constituted the only law governing pension agreements between employers and employees.

The 1954 Code focused on three basic issues in determining whether a plan was qualified: (1) contributions were required to be made to a separate trust and the employer was not permitted to recover any monies from the trust until all benefits of the plan were satisfied;[16] (2) the plan could not discriminate in favor of officers, shareholders, supervisors or highly compensated employees with regard to pension benefits;[17] and (3) upon termination of the plan or complete discontinuance of contributions, the rights of employees to benefits "to the extent funded" became nonforfeitable to ensure that no funds reverted to the employer unless all benefits were paid.[18]

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[15] Int. Rev. Code of 1954, ch. 1, §§ 404(a), 402(a)(1) and (2), 68A Stat. 135-142 (now I.R.C. §§ 404, 402).

[16] Int. Rev. Code of 1954, ch. 1, § 401(a)(2), 68A Stat. 134 (now I.R.C. § 401(a)(2)).

[17] Int. Rev. Code of 1954, ch. 1, § 401(a)(4), 68A Stat. 135 (now I.R.C. § 401(a)(4)).

[18] Int. Rev. Code of 1954, ch. 1, § 401(a)(7), as amended by P.L. 87-792, § 2, 76 Stat. 809 (now I.R.C. § 411(d)(3)).

The concept of "vesting" was adopted by the Internal Revenue Service to prevent discrimination in favor of highly paid officers and shareholders by requiring plans to provide a benefit, to the extent funded, to all those who reached the retirement age set forth in the plan. In addition, to avoid the employer's firing rank and file employees before retirement age without paying the benefits which had already been funded and for which the employer had already received a tax deduction, the IRS, under its anti-discrimination rules, required in certain cases that some benefit be paid to employees who were terminated before retirement age if they had worked for the employer a given number of years and funds were sufficient to do so.[19]

A vested benefit, prior to ERISA, did not create a contractual obligation between the employee and the employer or the plan with regard to its payment. Rather, the concept of vesting was adopted by the Internal Revenue Service to insure that the contributions for which an employer received an income tax deduction were not diverted to pay greater benefits to the higher paid employees. In fact, prior to ERISA a vested benefit could be forfeited for nondiscriminatory purposes, such as certain conduct against the interests of the employer.[20] To prevent discrimination, the Internal Revenue Service often required companies with large employee turnover experience, such as professional service corporations, to provide vested benefits prior to retirement age, in order to obtain prior Internal Revenue Service qualification approval.[21] Under collective bargaining agreements, vested benefits often were provided in plans, such as the

[19] See n. 47, *infra* at p. 27.

[20] See discussion *infra* at p. 27.

[21] Part 5(c), I.R.S. Publication No. 778 (1972). In order to ensure the advantageous tax treatment of a tax qualified plan, employers often submit plans to the Internal Revenue Service for prior approval. The Internal Revenue Service may use stricter standards in granting approval than are required by statute.

Nachman Plan, in order to ensure that older employees with seniority received the funds in the plan in the event of termination of employment before retirement age.

Rather than merely concentrating on when an income tax deduction should be available to an employer, ERISA, after all its provisions became effective, created a private pension system, ensuring that all employees who worked for companies sponsoring plans would, after a minimum period of service, receive certain benefits. ERISA contains four titles:

Title I,[22] "Protection of Employee Benefit Rights," is divided into five Parts, and sets forth substantive provisions that all retirement plans (whether or not tax-qualified) must contain:

Part 1,[23] "Reporting and Disclosure," covers reporting and disclosure requirements (effective date: January 1, 1975),

Part 2,[24] "Participation and Vesting," provides participation and minimum vesting requirements, precluding conditioning payment on sufficient assets at termination (effective date: plan years beginning on or after January 1, 1976),[25]

Part 3,[26] "Funding," provides minimum funding obligations for all benefits provided (effective date: plan years beginning on or after January 1, 1976),

Part 4,[27] "Fiduciary Responsibilities," regulates certain conduct of plan administrators (effective date: January 1, 1975), and

[22] ERISA §§ 2-514, 29 U.S.C. §§ 1002-1144 (1975).

[23] ERISA §§ 101-111, 29 U.S.C. §§ 1021-1031 (1975).

[24] ERISA §§ 201-211, 29 U.S.C. §§ 1051-1061 (1975).

[25] The effective dates noted in parts 2 and 3 of Title I are those applicable to plans in existence on September 2, 1974.

[26] ERISA §§ 301-306, 29 U.S.C. §§ 1081-1086 (1975).

[27] ERISA §§ 401-414, 29 U.S.C. §§ 1104-1114 (1975).

Part 5,[28] "Administration and Enforcement," concerns both criminal and civil enforcement (effective date: January 1, 1975).

Title II,[29] "Amendments to the Internal Revenue Code Relating to Retirement Plans," amends the 1954 Code. Certain of the amendments to the Code have the effect of requiring tax-qualified plans to adopt the same participation, vesting and funding provisions as contained in Title I.

Title III,[30] "Jurisdiction, Administration, Enforcement, Joint Pension Task Force, Etc.," is concerned with the respective jurisdictions of the Department of Labor and Department of Treasury regarding regulation and enforcement of ERISA.

Title IV,[31] "Plan Termination Insurance," creates an insurance carrier, the PBGC, to insure against the loss of benefits arising from plan termination. Premiums are to be paid by insured plans. The PBGC insurance guarantees all nonforfeitable benefits under the terms of a plan (with certain limitations not relevant hereto). If assets of a plan are insufficient at termination to pay nonforfeitable benefits, the PBGC will pay the excess and has a right of subrogation therefor against the employer. Various effective dates are provided, the earliest of which is July 1, 1974 for certain coverage.

With the enactment of ERISA, the Internal Revenue Service requirements as to when a contribution is tax deductible and the contractual bargaining powers of employers and employee representatives no longer jointly determine the substantive provisions of retirement plans. ERISA established a private pension system by requiring that in general, all employees of a plan sponsor *must* become participants after they are employed for one year,[32] and all plans must provide

[28] ERISA §§ 501-514, 29 U.S.C. §§ 1131-1144 (1975).

[29] ERISA §§ 1011-2008, I.R.C. §§ 401-415.

[30] ERISA §§ 3001-3042, 29 U.S.C. §§ 1201-1242 (1975).

[31] ERISA §§ 4001-4081, 29 U.S.C. §§ 1301-1381 (1975).

[32] ERISA § 202(A)(1)(a)(ii), 29 U.S.C. § 1052 (1975); I.R.C. § 410(a)(1)(A)(ii).

nonforfeitable benefits for all participants under a timetable which may be no less restrictive than any of the three schedules set forth in the statute.[33] In addition, ERISA adopted standards for funding pension plans which for the first time require annual contributions to cover the actuarially determined cost of funding for past service over a 30-year period, investment losses, as well as current services.[34] Prior to ERISA, past service had never been required to be funded (other than interest thereon) unless the employer contractually agreed otherwise; ERISA requires such funding.

Thus, with the adoption of ERISA, the statutory framework governing retirement plans became significantly more pervasive. Because the costs to employers of adopting these new requirements were substantial, however, Congress delayed the effective date for the adoption of the changes relating to participation, vesting and funding for plans in existence on January 1, 1974, to the first plan year commencing *after* December 31, 1975.[35]

Nachman contends that the vested benefits which it agreed with the UAW to provide prior to ERISA, and was not required by law to provide, are to be governed by its collective bargaining agreement with the UAW since it was not required to change the nature of its contractual bargain until January 1, 1976, prior to which it terminated the Plan. Under Title IV the PBGC insures only "nonforfeitable" benefits under the terms of plans terminating after June, 1974, but the benefits provided under the Nachman Plan and collec-

[33] ERISA § 203(a), 29 U.S.C. § 1053(a) (1975); I.R.C. § 411(a)(2).

[34] ERISA § 402(b)(3), 29 U.S.C. § 1082(b)(3) (1975); I.R.C. § 412(b)(3).

[35] ERISA § 306(b), 29 U.S.C. § 1086(b) (1975). As this Court observed in *City of Los Angeles Dep. of Water* v. *Manhart*, 435 U.S. 702, 721, n. 40 (1978), ERISA "paid careful attention to the problem of retroactivity. It set a wide variety of effective dates for different provisions of the new law."

tive bargaining agreement are not "nonforfeitable" as that term is defined in ERISA; or were such benefits required to become "nonforfeitable" prior to January 1, 1976.

II

NACHMAN IS NOT LIABLE FOR CONTINUED FUNDING OF THE PLAN SINCE UNDER THE PLAIN AND UNAMBIGUOUS LANGUAGE OF ERISA THE BENEFITS AT ISSUE WERE NOT "NONFORFEITABLE" AS DEFINED IN ERISA.

As discussed above, ERISA requires the PBGC to guarantee, and employers to be liable for, only "nonforfeitable benefits . . . under the terms of a plan . . ." ERISA § 4022(a), 29 U.S.C. § 1322(a). The statutory definition of "nonforfeitable" is set forth in ERISA § 3(19), 29 U.S.C. § 1002(19), which provides that " 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant . . . to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan."

Under the plain meaning of this language, which should be applied absent any ambiguity,[36] the benefits contracted for and provided by the Nachman Plan were not "nonforfeitable" since they were expressly conditioned upon and limited to the sufficiency of assets at termination. Only if the Plan had been in existence on January 1, 1976 (the effective date of the minimum funding and vesting requirements of Titles I and II) would amendments have been required for the Nachman Plan to delete this condition[37] and provide truly nonforfeitable benefits.

Thus, the benefits at issue, or the claims thereto, were not "unconditional" or "legally enforceable against the plan."

[36] *U.S.* v. *Public Utilities Commission of Cal.*, 345 U.S. 295 (1953); *Martin* v. *Hunter's Lessee*, 1 Wheat 304 (1816).

[37] Treas. Reg. § 1.411(a)-4, 26 C.F.R. § 1.411(a)-4 (1978).

Under the dictionary definition, "nonforfeitable" means not subject to loss or forfeiture; cannot lose the right to.[38] "Unconditional" is defined as "not limited in any way; not bound or restricted by conditions or qualifications."[39] "Enforce" means "to put or keep in force . . . to obtain (payment, obedience, etc.) by force or compulsion."[40]

The benefits at issue, or the claims thereto, clearly do not meet any of these definitions since both Nachman and its employees, acting through their collective bargaining agent, agreed that the benefits would be paid only to the oldest employees with seniority and only to the extent funded at termination, and that Nachman would not be liable for such payments beyond the required contributions made prior to termination. Thus, the benefits and the claims thereto were both forfeitable and conditional, and could not be enforced against the Plan.[41] Since the parties have conceded, and the lower courts have found, that Nachman complied fully with the Plan terms and made all required contributions prior to termination, and that the Plan was properly terminated prior to the effective date of the minimum funding and vesting requirements of Titles I and II, the claims to the benefits at issue were forfeited under the terms of the Plan.

Faced with this simple logic and the uncontested facts of this case, the PBGC and UAW have been forced to employ tortured reasoning to support their position that the benefits

[38] Oxford English Dictionary 448 (unabr. ed. 1970).

[39] Webster's New International Dictionary of the English Language 2486 (unabr. 3d. ed., 1976).

[40] Random House Dictionary of the English Language 473 (unabr. ed. 1966).

[41] Indeed, the regulation promulgated under the 1954 Code provision as amended by Title II of ERISA, which requires a plan to provide nonforfeitable benefits after January 1, 1976, states that rights to benefits "which are conditioned upon a sufficiency of plan assets in the event of a termination are considered to be forfeitable because of such condition." Treas. Reg. § 1.411(a)-4, 26 C.F.R. § 1.411(a)-4 (1978).

were "nonforfeitable." First, they have contended that the PBGC's own definition of nonforfeitable, contained in 29 C.F.R. § 2605.6(a), should take precedence over the statutory definition in section 1002(19). Next, the PBGC and the UAW have contended that even under the statutory definition the benefits are nonforfeitable because the employees in question satisfied all of the employment and age conditions to receive benefits under the Plan. Finally, the respondents have sought refuge in the legislative history of ERISA to find support for their position. These arguments, all but the first of which were adopted by the court of appeals, are incorrect.

A

THE STATUTORY DEFINITION OF "NONFORFEITABLE" TAKES PRECEDENCE OVER THE PBGC'S DEFINITION.

The PBGC has chosen to provide its own definition of nonforfeitable benefits in its regulation, 29 C.F.R. § 2605.6(a), which states that "a benefit payable with respect to a participant is considered to be nonforfeitable, if on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required of him or her under the provisions of the plan to establish entitlement to the benefit . . ."[42] It is little wonder that the PBGC would prefer the application of its own definition, since it wholly ignores the statute's requirement that to be nonforfeitable, and thus insured by the PBGC, a benefit, and a claim to a benefit, must be "unconditional" and "legally enforceable against the plan."

[42] Even under the PGBC's own definition, the benefits at issue are not nonforfeitable. According to the PBGC's definition, a benefit is nonforfeitable only if *payable* with respect to a participant. The benefits at issue are not payable under the terms of the Nachman Plan since the Plan provides benefits as follows: "Benefits provided for herein shall be only such benefits as can be provided by the assets of the Fund." Article V, § 3, of the Plan, App. 24.

Both the district court and the court of appeals, however, correctly rejected this position. Although the PBGC and the UAW have argued that the statutory definition contained in Title I should not apply to the obligations of the PBGC set forth in Title IV, the term "nonforfeitable" is used without distinction throughout ERISA. This term, the definition of which appears only in Title I, and by its terms applies to "this Title [I]," must mean the same thing in that Title as it does when used in Title II, both of which contain the same substantive provisions in dealing with the forfeiture of rights on early termination of employment.[43] Title IV, which establishes the PBGC, provides for termination insurance for nonforfeitable benefits as that term is used in Title I and II. The Title I definition, therefore, necessarily applies to the other Titles.[44]

[43] Significantly, the court of appeals failed to recognize that Title I, which governs all employee benefit plans, and Title II, which governs tax-qualified plans, both contain the same requirement to provide nonforfeitable benefits in the same language. The court of appeals, in explaining the content of ERISA, stated:

> "Title I attacks the lack of adequate 'vesting' provisions in many plans . . . Title I establishes minimum vesting standards to ensure that after a certain length of service an employee's benefit rights would not be conditioned upon remaining in the service of his employer. Employers were required to amend the terms of their plans to reflect these minimum standards effective January 1, 1976 . . . To improve the fiscal soundness of these pension funds, Title II amends the Internal Revenue Code to require minimum funding." Appendix to Petition, p. 4.

In fact, Title II establishes the same minimum vesting standards as Title I. ERISA § 203; I.R.C. § 411. The definition of "nonforfeitable," therefore, must have the same meaning in Titles I and II.

[44] The PBGC, in its opinion letters, recognizes the need to carry over definitions from Title I to Title IV, although all such definitions, by their terms, apply only to Title I. Thus, the PBGC has incor-

(Footnote continued on following page)

This reasoning follows the general rule that, "[i]n the absence of express restriction it may be assumed that a term is used throughout a statute in the same sense in which it is first defined." *Pampaga Sugar Mills* v. *Trinidad*, 279 U.S. 211, 218 (1929). As both lower courts held in the instant case, "[a]n earlier specific definition may properly color a subsequent use of the same words without redefinition." (App. 82; Appendix to Petition p. 7, n. 6, quoting from *Kent Manufacturing Corp.* v. *Commission*, 288 F.2d 812, 815 (4th Cir. 1961).) It would be intolerable to have different definitions of the important concept of nonforfeitable benefits for one title of ERISA than for another.

Although the PBGC has contended that it is entitled to judicial deference with respect to its regulations, such defer-

[44] (Continued)

porated the Title I definitions of "participant" (ERISA § 3(7), 29 U.S.C. § 1002(7)) and "plan year" (ERISA § 3(39), 29 U.S.C. § 1002(39)) in its Opinion Letters 75-3 and 75-101, respectively, both of which letters deal with Title IV obligations. This treatment is consistent with the Congressional intent (discussed *infra* at pp. 29-31) to apply the Title I definition of "nonforfeitable" to Titles II and IV of ERISA, the provisions amending the 1954 Code and establishing termination insurance. In the House bill which led to ERISA, H.R. 2, the definitional section (including what is now Section 1002(19) defining "nonforfeitable") applied to the provisions contained in a single Title, governing *both* the minimum vesting requirements *and termination insurance*. H.R. 2, 93d Cong., 2d Sess. §§ 2-514 (1974). The definitional section began "For purposes of this Title. . . ." Thus, in H.R. 2, the definition of "nonforfeitable" applied to both minimum vesting provisions and to what benefits were to be insured. The Senate Bill, S. 1179 (S. 1179, 93rd Cong., 2d Sess. (1974)), the organization of which was adopted in the final version of ERISA, placed the minimum vesting provisions and the insurance provisions in *separate* Titles. Thus, the carry-over of the definitional section of H.R. 2 with its precatory language should be read in light of the obvious intent to apply the definitions to both Titles of ERISA containing the new requirement to provide nonforfeitable benefits (Titles I and II), and the Title establishing insurance of such benefits (Title IV), as ultimately enacted.

ence is inapplicable where the agency is attempting to construe a statute contrary to its terms and intent. *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974). "A regulation which . . . operates to create a rule out of harmony with the statute [administered by the agency] is a mere nullity." *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 134 (1936). Moreover, since the definition of which benefits are nonforfeitable determines the scope of the PBGC's insurance coverage, the agency is entitled to little or no deference. "An agency may not finally decide the limits of its statutory power." *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946).

In addition, the PBGC definition, which takes into account only the conditions imposed on the employees and ignores the other conditions imposed on the receipt of benefits, was rejected by Congress in enacting ERISA. In an early version of ERISA (H.R. 2), the term "nonforfeitable benefit" was defined as a claim "which notwithstanding any conditions subsequent which could affect receipt of any benefit flowing from such rights, arises from the participant's service and is no longer contingent on continued service."[45] Congress' rejection of this language and enactment of the additional requirement that the benefit or claim to a benefit be "unconditional and . . . legally enforceable against the plan" demonstrates that the PBGC's definition, which so closely parallels the rejected language, should not be employed.

The statutory definition of "nonforfeitable" thus takes precedence over the PBGC's definition of that term.[46]

[45] Welfare and Pension Plan Legislation: Hearings Before the General Subcommittee on Labor of the Committee on Education and Labor on H.R. 2 and H.R. 462, 93rd Cong., 1st Sess., 3-4 (1973) (text of H.R. 2).

[46] The issue of the PBGC's lack of authority to redefine "nonforfeitable" by regulation, along with the impropriety of the agency's attempt to expand its jurisdiction, is addressed at length in the *amicus curiae* brief filed herein by Concord Control, Inc.

B

UNDER THE STATUTORY DEFINITION, THE BENEFITS AT ISSUE ARE NOT "NONFORFEITABLE."

The court of appeals, while holding that the statutory definition of section 1002(19), rather than the PBGC's version, governs what benefits are insured under Title IV, held that the benefits at issue were nonforfeitable. Although conceding that the district court's construction was "linguistically plausible" and that "[u]nder ordinary usage, it may seem illogical to conclude that the Nachman Plan provides employees with nonforfeitable benefits when a clause in the Plan expressly precludes recovery from the employer in the event the plan terminated with insufficient assets," the court of appeals, quoting from *Riley v. MEBA Pension Trust*, 570 F.2d 406, 408-409 (2d Cir. 1977), concluded that, "The lower court fell victim to the not uncommon error of reading technical pension language as if it were ordinary English speech." (Appendix to Petition p. 8.)

The court of appeals was wrong. Under either ordinary English or "technical pension language" the benefits at issue were forfeitable because the Plan provided for forfeiture upon the condition that the Plan had insufficient assets at termination, and because ERISA did not preclude such provisions until after the Plan was terminated.

As recognized in *Riley, supra*, 570 F.2d at 409, a claim to a benefit, which is subject to a condition subsequent, is a forfeitable claim. Such a condition "makes [the employee's] claim legally unenforceable against the Plan; it thus constitutes a forfeiture within the meaning of ERISA." Until pension plans were required to be amended to eliminate such conditions in 1976, benefits or claims subject to such conditions were not, by definition, nonforfeitable.

The court of appeals reasoned that the Nachman Plan benefits were "unconditional" since [a]ll conditions placed upon the *participants* such as age and length of service have

been met . . . . Satisfaction of the claims is dependent upon sufficient assets, but this should not be viewed as a condition on the claim." (Emphasis added; Appendix to Petition p. 9.) No peculiarities of "technical pension language" could lead to such an illogical result. Unconditional means unconditional: "not limited in any way; not bound or restricted by conditions or qualifications," such as sufficiency of plan assets upon termination.

Moreover, the court of appeals looked only to the conditions placed upon the participants, and expressly ignored the additional conditions on the benefits and claims to benefits contained in the Plan. Such a construction recognizes only a portion of the rights and obligations provided by the Plan. This is especially inappropriate where the Plan was the product of collective bargaining by parties of equal strength. As the district court noted (App. 84), both the participants and Nachman created the expectation that full payments of all benefits provided by the Plan was conditioned on the Plan's being in existence the full 30 years. To ignore this condition, as did the court of appeals, is both linguistically and factually incorrect.

The court of appeals also held that the requirement of section 1002(19) that the claim to a benefit be "legally enforceable against the plan" was satisfied in the instant case since,

> ". . . although the benefit claim is admittedly not legally enforceable against the employer under the terms of the plan, the statute requires only that the claim be enforceable against the *plan*. Nachman's employees' claims are enforceable against the plan, they simply may not be collectable." (Emphasis in original; Appendix to Petition pp. 8-9.)

This rationale is fallacious. A right or claim which cannot, by its own terms, be collected, cannot be enforceable. Especially in the instant case, as noted above, since a key condition imposed by the Plan—the sufficiency of assets at termination—had not been met. the claims to the unfunded benefits cannot

be enforced by a participant against either the Plan or Nachman. Enforceability is a term used in contract law; the ability of a participant to enforce the payment of benefits must be viewed in light of the contract into which Nachman and the UAW entered. Nachman and the UAW agreed that Nachman would make a contribution to the Plan each year of its collective bargaining agreement and benefits would be paid therefrom to the extent funded. ERISA did not require a change in the nature of the agreement until January 1, 1976, after the Plan was terminated. Until the nature of Nachman's promise was legally required to be changed the benefits at issue were not enforceable against either Nachman or the Plan.

The court of appeals' rationale also totally ignores that the Nachman Plan specifically provided that the benefits at issue could not be enforced against the *Plan*, as well as against the employer, in the event the Plan was terminated with insufficient assets. Article X of the Plan (App. 32-35, as amended, App. 52) governs Plan termination. Sections 1 and 2 of Article X give both the employer and the UAW the right to terminate the Plan, after expiration of the collective bargaining agreement, upon 90 days' written notice. Section 3 provides that:

> "In the event of termination of the Plan, the assets *then remaining* in the fund [after payment of expenses] . . . shall be allocated by the Board [of Administration of the Plan] on the basis of present actuarial values *to the extent that they shall be sufficient*, for the purposes of paying retirement benefits . . . in the following order of precedence. . . ." (Emphasis added.)

There follows a list of six categories of preferred benefits based on age and seniority. Section 3 then provides:

> "If, after having made provision in the above order of precedence for some but not all of the above categories, the assets then remaining in the Fund are not sufficient to provide completely for the benefits for Employees in the next category, such benefits shall be provided for each such Employee on a pro-rata basis."

Thus, the claims to the benefits which were insufficiently funded at the termination of the Nachman Plan were expressly

unenforceable against the Plan at termination, because the Plan itself was precluded from allocating the remaining funds except in the order of priority set forth in Article X, § 3. Nachman and its employees had agreed that, (1) only if the Plan had remained in effect for 30 years could the benefits at issue be fully funded, (2) either party could terminate the Plan prior to full funding, and (3) the rights to these benefits would be forfeited to the extent there were insufficient assets at termination. As a result, the participants had no "claim" to any benefits in excess of the assets remaining at Plan termination.

The benefits at issue in this case and the claims thereto, therefore, did not meet the requirements of section 1002(19)—they were not "nonforfeitable" and thus are not insurable by the PBGC. Since the Plan was lawfully terminated before the effective date of the minimum vesting and funding requirements of Titles I and II of ERISA and after some 15 years, rather than the 30 years required for full funding, a major condition placed on those benefits by the Plan had not been met. Accordingly, Nachman is not obligated to provide continued funding for these benefits.

Under the plain and unambiguous language of ERISA, Nachman is entitled to judgment, and the decision of the court of appeals should be reversed.

III

THE LEGISLATIVE HISTORY OF ERISA, IF NECESSARILY CONSULTED, REQUIRES REVERSAL OF THE RULING BELOW.

A

THE LEGISLATIVE HISTORY SHOULD NOT BE CONSULTED SINCE THE LANGUAGE OF ERISA IS CLEAR AND UNAMBIGUOUS.

The rationale of the court of appeals, that benefits provided before the effective date of Titles I and II of ERISA and conditioned upon sufficiency of assets are nonforfeit-

able, proceeds not from the literal boundaries of ERISA, but principally from a strained reading of the legislative history. The short answer to this argument, as this Court noted in considering the impact of the Age Discrimination in Employment Act of 1967 on a retirement plan, is that the legislative history is irrelevant where the statute is clear and unambiguous on its face. *United Air Lines* v. *McMann*, 434 U.S. 192, 199 (1977).

Congress attempted to secure precision and certainty in the judicial and administrative construction of ERISA by providing a glossary of terms used in the statute, including the term "nonforfeitable." Given the controlling definition supplied by the Congressional draftsmen, there is no need to look to the legislative history. Indeed, "there would be little use in such a glossary if we were free in despite of it to choose a meaning for ourselves." *Fox v. Standard Oil Co.*, 294 U.S. 87, 96 (1935). Accordingly, the heavy reliance by the court of appeals on the legislative history of ERISA is misplaced.

The conclusions which the court of appeals drew from the legislative history are also erroneous, as the discussion below will demonstrate.

B

THE COURT OF APPEALS ERRED IN RULING THAT CONGRESS INTENDED TO EQUATE THE TERMS "VESTED" AND "NONFORFEITABLE" PRIOR TO THE EFFECTIVE DATES OF ERISA SINCE THOSE TERMS HAD DIFFERENT MEANINGS PRIOR TO ERISA.

The court of appeals, in reviewing the legislative history, relied on a syllogism to support its decision: first, in debating the enactment of ERISA, Congress occasionally used the terms "nonforfeitable" and "vested" interchangeably; second, the benefits at issue were known as "vested" benefits prior to ERISA; thus, the court below reasoned, Congress intended the benefits at issue to be nonforfeitable.

The court was mistaken, because its reasoning ignored the fact that, prior to ERISA, "nonforfeitable" and "vested" were different concepts, and only after all provisions of ERISA became effective did those terms become identical. "Nonforfeitable," under the 1954 Code prior to its amendment by ERISA, applied only to fully funded, unconditionally payable benefits; "vested" benefits, on the other hand, could be subject to certain conditions, including the sufficiency of funding of the plan through its continued existence, and thus could be forfeited. ERISA, *for the first time,* required vested benefits to be nonforfeitable. The interchangeable use of these terms in the Congressional debate referred to the new, stricter requirements to provide truly nonforfeitable benefits imposed after all the effective dates of Titles I, II and IV.

As the court of appeals recognized, prior to ERISA a benefit could be "vested" even when the plan providing that benefit conditioned it on the sufficiency of plan assets at termination. (Appendix to Petition p. 12.) Moreover, although a vested benefit was not subject to forfeiture upon the employee's termination of service in the normal course of events, it could be forfeited due to discharge for cause, employment by a competitor or divulgence of trade secrets. Clearly, prior to ERISA a benefit which had vested was not required to be nonforfeitable since it could be forfeited due to certain conduct of the employee (e.g., employment with a competitor) or acts beyond the employee's control (e.g., early termination of a plan). A vested benefit meant only that an employee was able to terminate employment without necessarily losing such benefits merely because he terminated prior to normal retirement age.[47]

[47] Rev. Rul. 69-421, 1969-2 C.B. 590; Rev. Rule 69-157, 1969-1 C.B. 115. The term "vest" never appeared in the 1954 Code until after the enactment of ERISA. As previously discussed (at p. 12-13), the concept of vesting was adopted by regulation to prevent discrimination in favor of highly placed employees, and did not apply to collectively bargained plans such as the Nachman Plan. .

The court of appeals neglected to examine the pre-ERISA meaning of "nonforfeitable" in determining the relationship between that term and "vested." If it had, the court would have discovered that nonforfeitable rights to benefits were limited to only those which were fully funded. A nonforfeitable benefit could never be conditional. The term "nonforfeitable" prior to ERISA was used in the 1954 Code only twice, not to promise a benefit, but to prevent tax-deductible contributions from reverting to an employer: Int. Rev. Code of 1954, ch. 1 § 401(a)(7), as amended by P.L. 87-792, § 2, 76 Stat. 809 (now I.R.C. § 411 (d)(3)) required that upon termination of a plan, "the rights of all employees to benefits accrued to the date of such termination or discontinuance *to the extent funded* . . . [be] nonforfeitable" (emphasis added); Int. Rev. Code of 1954, ch. 1, § 401(d)(2) required that plans for sole proprietorships and certain partnerships provide that "the employees' rights to or derived from *the contributions* under the plan [be] nonforfeitable *at the time the contributions are paid* to or under the plan." (Emphasis added.)

Similarly, the regulations promulgated under the 1954 Code applied "nonforfeitable" only to rights in contributions already made, and not to benefits which had not been fully funded. For example, "[a]n employee's beneficial interest *in the contribution is nonforfeitable . . . at the time the contribution is made* if there is no contingency under the plan which may cause the employee to lose his rights in the contribution." (Emphasis added.) Treas. Reg. § 1.402(b)-1(a)(2)(i), T.D. 6203, 1956-2 C.B. 245 (now Treas. Reg. § 1.402(b)-1(d)(2)(i)). Again, "nonforfeitable" applied only to a funded promise to pay benefits.

Accordingly, the benefits at issue provided by the Nachman Plan were, prior to the effective date of Titles I and II of ERISA, vested in a contractual sense, so that an employee with seniority who terminated employment before age 65 might receive benefit payments, but such vested benefits were not nonforfeitable since they were conditioned on full funding and were, in fact, not fully funded. Although the Congressional history shows the use of the word "vested" interchangeably with the word "nonforfeitable," the former term could not, by definition, have been given its pre-ERISA meaning. Rather, it was being employed in the sense it would ultimately be used in ERISA—to mean a benefit which was, in all events, unconditional and enforceable (i.e., nonforfeitable).

It was this intent to *change* the meaning of "vested" which permeates the Congressional reports, not an intent to define the concept of nonforfeitability to mean anything less than a fully funded, unconditional benefit. The court of appeals erred in finding otherwise. The 1954 Code permitted Nachman and the UAW to establish a plan which provided that the benefits at issue would be paid only if sufficiently funded. Since the Plan complied with all statutory requirements, the terms of the Plan and the contract between Nachman and the UAW must govern whether the benefits at issue are payable. The benefits which the PBGC now seeks to insure were never contracted for, and thus Nachman cannot be held liable for their payment.

C

UNDER EACH BILL LEADING TO THE FINAL FORM OF ERISA, ONLY TRULY NONFORFEITABLE BENEFITS WERE TO BE GUARANTEED.

ERISA, as enacted, is an amalgamation of two bills—H.R. 2, as passed by the U. S. House of Representatives on February 28, 1974, and S. 1179 as reported to the U. S. Senate by the Committee on Finance on August 21, 1973. The court of appeals found that ERISA requires the guarantee of benefits which, under the terms of a plan, are forfeitable unless fully funded. Each bill prior to enactment of ERISA, however, proposed a structure for a private pension system whereby only truly nonforfeitable benefits, and not those conditioned upon funding or any other condition, would be insured.

Of the two bills, only H.R. 2 (as passed by the House) contained a definition of "nonforfeitable"—the same definition which appears in ERISA, in § 3(19) of each:

"Nonforfeitable, when used with respect to a pension benefit or right, means a claim obtained by a participant . . . to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the Plan. . . ."

This definition was applicable to Title I of H.R. 2, which, as distinguished from ERISA, contained both (1) the minimum vesting requirements (section 203) and (2) the provisions governing termination insurance by the PBGC (section 409). In the ultimate version of ERISA, the minimum vesting requirements were placed in Title I and the termination insurance was covered in a separate title, Title IV. The definitional section of H.R. 2 was enacted almost word for word in the final version of ERISA.

Thus, under H.R. 2, the same definition of "nonforfeitable" applied to the provisions governing which benefits were required to be provided as well as which benefits were to be insured. Clearly, only truly nonforfeitable benefits, and not benefits conditioned upon sufficient funding, were to be insured. Moreover, the benefits to be insured were, under section 409(b) of H.R. 2, only those which were "nonforfeitable . . . *according to the schedule in section 203 in effect for such plan on* [*the*] *termination date.*" (Emphasis added.)[48] Since the vesting schedules in section

[48] The legislative history indicates that the reason this language was changed in the final version of ERISA, was that Congress decided to guarantee all benefits promised under a plan, not only those required to be nonforfeitable under the vesting schedules in section 203 as ultimately enacted. H. Rep. 93-1280, 93d Cong., 2d Sess. 368 (1974), reprinted in 1974 U.S. Code Cong., & Ad. News 5038, 5147.

203 were identical to those in section 203 of ERISA (29 U.S.C. § 1053 (1975)), and since the benefits provided in the schedules were those unconditional benefits which plans such as Nachman's were not required to adopt until January 1, 1976, it is clear that the House draftsmen never intended to insure, or require employers to be responsible for, the benefits at issue prior to January 1, 1976.

Under S. 1179, the requirement to provide nonforfeitable benefits was delayed due to the administrative burden and increased costs of providing nonforfeitable benefits. A plan in existence on the date of enactment had to provide nonforfeitable benefits for the first plan year beginning on or after January 1, 1976. The insurance of benefits was delayed even further so that no benefits would be guaranteed under plans terminating before 1978. Section 422(b). The committee report accompanying S. 1179 explains the reason for the delay in insuring benefits: "Premium taxes are to be paid for a minimum of 3 years before any benefits are paid out to give the new insurance program time to accumulate funds with which to pay benefits." S. Rep. 93-383, 93d Cong. 1st Sess. 87 (1973), ***reprinted in*** 1974 U.S. Code Cong., & Ad. News 4890, 4898. Since the insurance provisions would not come into effect under S. 1179 until after a plan was required to provide nonforfeitable benefits, only truly nonforfeitable benefits, and not those conditioned upon sufficient funding, would be guaranteed.

Titles I and II of ERISA do not permit a benefit which is required to be nonforfeitable to be conditioned upon sufficient funding. Under neither bill culminating in ERISA would benefits conditioned upon sufficient funding be insured, yet the PBGC now improperly seeks to insure benefits so conditioned.

D

NACHMAN WAS NOT REQUIRED TO FUND THE PLAN IMMEDIATELY UPON TERMINATION, SINCE CONGRESS INTENDED TO DELAY THE EFFECTIVE DATE OF THE VESTING AND FUNDING PROVISIONS OF ERISA DUE TO THE GREAT EXPENSE TO BE IMPOSED ON EMPLOYERS WITH RESPECT TO EARLIER ESTABLISHED PLANS.

The PBGC, a government-owned insurer created by ERISA, guarantees the payment of nonforfeitable benefits upon plan termination and is financed, in part, by premiums asssesed against plan sponsors such as Nachman. To prevent employers from establishing new plans with unrealistic benefits, or increasing benefits under established plans in reliance on the insurance provisions of ERISA, ERISA grants the PBGC a limited right of subrogation against employers whose pension plans are inadequately funded at the time of termination. ERISA § 4062(b); 29 U.S.C. § 1362(b) (1975).[49]

As an insurer, the PBGC is to guarantee only what the plan itself is legally obligated to pay. The provisions of ERISA specifying those benefits which are insured by the PBGC provides:

> "the [PBGC] shall guarantee the payment of all nonforfeitable benefits . . . *under the terms of a plan.*" ERISA §4022(a); 29 U.S.C. §1322(a) (1975). (Emphasis added.)[50]

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[49] See S. Rep. 93-383, 93d Cong. 1st Sess. 87 (1973), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4890, 4898, which articulates the concern that without such right of subrogation employers might be unrealistically generous in agreeing to substantial pension benefits.

[50] It should be noted that, contrary to the court of appeals' analysis, the PBGC is to insure the payment of "benefits" not "claims" to benefits.

As previously discussed, prior to 1976 the Nachman Plan was not required to delete its provisions which conditioned the benefits at issue on the sufficiency of assets at termination. Yet the court of appeals, agreeing with the PBGC, held that the termination program established by Title IV created liability outside the framework of a plan's terms. If, as Congress intended, the PBGC is merely an insurer of benefits "under the terms of a plan," it is impossible to justify the position that the PBGC insures, and Nachman must reimburse it, for benefits which were not forfeitable under the terms of the Plan.

The controversy results from the delay between the date of enactment of ERISA and the effective date of the vesting and funding provisions of ERISA. Congress delayed the date on which an employer must amend its plan to promise a nonforfeitable benefit, not subject to divestment, and undertake an obligation to fund past service liability. As the district court stated, Congress provided for that delay "[i]n order to allow for appropriate adjustments to those plans which were already in existence." App. 81. Evidence of congressional awareness of the substantial economic burdens that the new law would impose on employers in excess of already-existing obligations appears throughout the legislative history of ERISA.

> "In order to provide sufficient time for pension and profit-sharing plans to adjust to the new vesting and funding standards, to make provision for additional costs which may be experienced, and to permit negotiated agreements to transpire, the Committee has provided a . . . delayed effective date for compliance with the vesting and funding standards."
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> * * *
>
> "[T]he Committee recognize[d] that despite a 3-year delayed effective date for compliance with vesting standards, there still may be some plans which experience

a cost burden that would result in substantial economic injury to the interests of employers and employees. As to these plans, provision is made that if they can demonstrate 'substantial economic injury' as defined and intended by the Act, they may be eligible for an additional period not to exceed five (5) years within which to commence compliance." S. Rep. No. 93-127, 93d Cong., 1st Sess. 22 (1973) reprinted in 1974 U.S. Code Cong. Ad. News 4838, 4872.

In fact, the sponsors of all of the bills which culminated in ERISA recognized and permitted mitigation of the increased expenses of funding nonforfeitable benefits by providing a delayed effective date for such requirements for plans in existence on the date of enactment. Congress thus balanced the interests of those affected by ERISA and gave employers the opportunity to react to the new law.[51] Nachman's first opportunity so to react was upon expiration of its collective bargaining agreement and, since it was closing its plant, it decided to exercise the right to terminate the Plan for which it had bargained with the UAW. Congress clearly did not intend to delay requiring an employer in such a position to provide a nonforfeitable benefit due to the substantial burden to employers of compliance, and yet create instant liability on September 2, 1974, for deficiencies in a plan's assets resulting from the failure to fund in full all vested benefits—something neither Illinois law nor the 1954 Code and regulations had required and something Nachman had not agreed to do.

Although the court of appeals correctly noted that ERISA was intended to guarantee payment of expected benefits (Appendix to Petition pp. 25-26), it incorrectly concluded that the benefits at issue were "expected" since such benefits were never promised, and the Nachman Plan terminated prior to the time it would have been required to promise such benefits. As the district court concluded, Nachman's employees

[51] See *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 247, 249 (1978); *City of Los Angeles Dep. of Water v. Manhart*, 435 U.S. 702, 721 (1978), discussed *infra* at pp. 35-6, 39-40.

had no expectation of receiving unfunded benefits. (App. 84.) The benefits at issue were not promised under the terms of the Plan, but only as the Plan would have been affected by ERISA had it remained in existence past January 1, 1976.

Contrary to the implications of the court of appeals' opinion, Nachman's position recognizes the integrity of the insurance program established by Title IV, by making it clear from the beginning that the scope of the PBGC's authority is to insure only benefits which a plan is legally obligated to pay. The PBGC, in its verified statement of facts in the district court (App. 70-74), explains that of the 136 plans which terminated on or before December 31, 1975, and for which the PBGC has assumed liability, 58 contain no limitation-of-liability provisions such as those contained in the Nachman Plan. The sponsors of those plans promised a nonforfeitable benefit, and it is the benefit provided by those plans which the PBGC termination insurance program insures in plans which terminated prior to the effective date of Titles I and II. Only such plans promised a benefit which covered employees could reasonably have expected to receive despite early plan termination. Not until such benefits became mandatory for all plans in 1976 would the PBGC's guarantee of benefits become universal.

The court of appeals in the instant case barely noted the grace periods in ERISA recognized in *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978). In *Allied*, this Court found unconstitutional a Minnesota statute which imposed liability on employers who terminated pension plans for the payment of unfunded benefits to all employees who had worked at least ten years. The Minnesota statute's "severe disruption of contractual expectations" was compared by this Court to the provisions for "gradual applicability or grace periods" in ERISA. 438 U.S. at 247. Indeed, this Court noted that, "Funding and vesting requirements [under ERISA] were delayed for an additional year [beyond the four months after enactment]. 29 U.S.C. §§ 1086(b), 1061(b)(2)." 438 U.S. at

249, n. 23.[52] These sections of ERISA are the very same sections upon which Nachman relies, and which the court of appeals disregarded in the instant case.

Moreover, the only Circuit Court decision (other than this case) dealing with the definition of "nonforfeitable benefit" under ERISA held that a benefit which had vested by the time the employee terminated his employment was in fact forfeitable, under the definition of section 1002(19), because under the terms of the plan it was subject to a condition subsequent: the benefit would be forfeited if the employee competed with his former employer. After 1976, such a benefit would be required by law to be nonforfeitable. *Riley* v. *MEBA Pension Trust, supra,* 570 F.2d 406, 409 (2d Cir. 1977).[53] The court in *Riley* also emphasized the importance of the effective dates provided by ERISA, noting:

> "The careful attention paid by Congress in [ERISA] to the problem of effective dates makes us hestitate to conclude that the courts have long been authorized . . . to create obligations similar to ERISA.[54] *** [C]are must be taken not to subvert the intention of Congress to postpone the effective date of the vesting provisions in order to afford a fair opportunity to bring plans and their application in line with the new vesting requirements. (Emphasis added.)" 570 F.2d at 409. See also *Moore* v. *Home Ins. Co.*, No. 77-2045, Slip op. at 2783 (9th Cir., August 3, 1978).

Along with a number of district court decisions dealing with these issues,[55] these cases provide clear judicial recog-

[52] See also, *City of Los Angeles Dep. of Water v. Manhart,* 435 U.S. 702, 721, n. 40 (1978), discussed *infra* at 39-40, where the Court noted the prospective nature of ERISA and the effective date provided by § 1086(b).

[53] The court in *Riley* went on to hold that, although the benefit was forfeitable, the employee had not in fact breached the condition subsequent. 570 F.2d at 413.

[54] Quoting from *Lugo v. Employees Retirement Fund,* 529 F.2d 251, 255 (2d Cir.), *cert. denied,* 429 U.S. 826 (1976).

[55] *Fremont v. McGraw Edison Co.,* 460 F.Supp. 599, 601 (N.D. Ill. 1978); *A-T-O, Inc. v. PBGC,* 456 F.Supp. 545 (N.D. Ohio 1978); *Winpisinger v. Aurora Corp. of Ill.,* 456 F.Supp. 559 (N.D. Ohio 1978); *Schlansky v. United Merchants & Manufacturers, Inc.,* 443 F.Supp. 1054, 1063-64 (N.D. N.Y. 1977).

nition of the congressional intent to grant a grace period to 1976 during which plan sponsors such as Nachman were not subject to the new minimum vesting and funding requirements imposed by ERISA. The intent so to delay the effect of these provisions is evident both in the legislative history and from the face of the statute.

The position of the PBGC and the UAW would render this grace period meaningless and nonexistent since the benefits at issue would have become "nonforfeitable" immediately upon enactment on September 2, 1974, rather than in 1976.[56] The court of appeals' citation of legislative history ignores the concern specifically expressed by Congress that the new, substantial economic burdens of ERISA must be phased in to allow plan sponsors "time . . . to adjust to the new vesting and funding standards, to make provision for additional costs which may be experienced, and to permit negotiated agreements to transpire. . . ." S. Rep. No. 93-127, 93d Cong. 1st Sess. 36, (1973), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4838, 4872.

In fact, the decision below would result in a retroactive application of ERISA. As the court of appeals concluded:

> "Title IV of ERISA does affect Nachman retroactively. . . . Although it is true that the statute applies only to prospective terminations, it also applies retrospectively to the invalidated exclusion of liability clauses in pension plans agreed upon prior to ERISA. Thus, to the extent that ERISA invalidates Nachman's otherwise valid acts which occurred prior to enactment, it is retroactive."

Although it acknowledged that the burden imposed on Nachman by retroactive application of ERISA "cannot be

[56] Further, the PBGC position would result in benefits being nonforfeitable for purposes of plan termination before the same benefits would become nonforfeitable for continuing plans. This result, however, is expressly precluded by ERISA § 4022(a), 29 U.S.C. § 1322(a), and by the PBGC's own regulation, 29 C.F.R. § 2605.6(a): . . . "benefits that become nonforfeitable solely as the result of the termination of a plan will be considered forfeitable."

characterized as insubstantial,"[57] the court of appeals justified that result by finding that the burden was "rationally related to the Congressional purpose." Appendix to Petition, p. 24.

Undoubtedly, as the court below noted, "Congress perceived a widespread problem of national importance" caused by early plan terminations. Appendix to Petition, p. 24. The court failed to consider, however, that Congress also perceived the substantial burden which would have been imposed on employers such as Nachman if the minimum vesting and funding requirements had become effective as to existing plans upon enactment in 1974. Yet, that is precisely the result imposed by the decision of the court of appeals.

The court of appeals' analysis rested upon the "mechanics of the insurance system established in Title IV," which took effect in 1974. Appendix to Petition, p. 4. Title IV, however, cannot be viewed in a vacuum. "[I]n interpreting separate provisions of a single Act [courts must] give the Act 'the most harmonious comprehensive meaning possible' in light of the legislative policy and purpose." *Weinberger* v. *Hynson, Wescott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1972). As previously discussed, although Congress provided that the PBGC's guarantee of benefit payments began in 1974, it expressly limited that guarantee to "the payment of all nonforfeitable benefits . . . under the terms of a plan." ERISA § 4022(a), 29 U.S.C. § 1322(a) (1975). Thus, when viewed in light of the delay until January 1, 1976 of the minimum vesting and funding requirements of Parts 2 and 3 of Title I, it is clear that Congress never intended to require the PBGC to insure, or employers to be responsible for, the benefits required to be provided after that date, unless the employer had previously committed itself to provide them.

[57] See Appendix to Petition, p. 24, n. 29.

Indeed, this Court has emphasized the care with which Congress approached the problem of retroactivity in ERISA. *City of Los Angeles Dep. of Water* v. *Manhart, supra,* 435 U.S. 702, 721, n. 40 (1978). In that case, this Court reversed the award of a refund of excess contributions to a pension fund found to have been required of female employees in violation of Title VII of the 1964 Civil Rights Act (42 U.S.C. § 2000(e)-2(a)(1)). The Court found that since "[d]rastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, . . ." could jeopardize the fund's solvency and ultimately the benefits provided, ". . . the rules that apply to these funds should not be applied retroactively unless the legislature has plainly commanded that result." 435 U.S. at 721. The footnote which followed explained that Congress, in enacting ERISA, "underlined the importance of making only gradual and prospective changes in the rules that govern pension plans by prescribing the variety of effective dates previously discussed herein.

The court of appeals in the instant case, however, found that contrary to this Court's opinion of congressional intent, Congress in fact intended to impose retroactive liability on Nachman in order to fulfill the "reliance interests" of Nachman's employees in the benefits provided under the Plan. This fallacious reasoning ignores the fact that the benefits were not promised, but were conditioned upon sufficiency of assets upon termination, and that the Plan was the result of collective bargaining between Nachman and the UAW. It also ignores the express provision of the Plan (Article IX, Section 1(b), at pp. 31) which provided that the Plan could be amended to comply with changes in state or federal law, but that no such amendment would be permitted which "would, in any manner, change the amount of contributions to be made by [Nachman]."

Thus, the parties contemplated the possibility that the laws governing pension plans could be changed, but mutually agreed, for the benefit of each party, that the contributions to the Plan would neither be increased nor decreased. It is precisely such intentions which Congress refused to frustrate. As recognized by this Court in the *Allied* and *Manhart* cases, Congress sought to balance the interests of the employers and employees by imposing new, costly requirements for pension plans but allowing time to adjust to the new law.

The decision of the court of appeals runs contrary to this congressional intent, and should be reversed.

CONCLUSION

For the foregoing reasons, Nachman is entitled to judgment in this action declaring that Nachman is not liable for continued funding of the benefits provided in the Nachman Plan beyond the assets remaining in the Plan at termination. The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed, and the judgment of the United States District Court for the Northern District of Illinois should be affirmed.

Respectfully submitted,

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ADDENDUM

STATUTES INVOLVED

United States Code, Title 26

§401(a)(2) [prior to amendment by ERISA]

"(a) REQUIREMENTS FOR QUALIFICATION.—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section— ***

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries; *** and"

§401(a)(4) [prior to amendment by ERISA]

"(4) if the contributions or benefits provided under the plan do not discriminate in favor of employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees."

§401(a)(7) [prior to amendment by ERISA]

"(7) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, upon its termination or upon complete discontinuance of contributions under the plan, the rights of all employees to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the amounts credited to the employees' accounts are nonforfeitable."

§402(a)(1) and (2) [prior to amendment by ERISA]

"(a) TAXABILITY OF BENEFICIARY OF EXEMPT TRUST.—

(1) GENERAL RULE—Except as provided in *** the amount actually distributed or made available to

any distributee by any employees' trust*** shall be taxable to him, in the year in which so distributed or made available ***.

(2) CAPITAL GAINS TREATMENT FOR CERTAIN DISTRIBUTIONS.— *** if the total distributions payable with respect to any employee are paid to the distributee within 1 taxable year of the distributee on account of the employee's death or other separation from the service, or on account of the death of the employee after his separation from the service, the amount of such distribution, to the extent exceeding the amounts contributed by the employee *** shall be considered a gain from the sale or exchange of a capital asset held for more than 6 months. ***"

§404(a) [prior to amendment by ERISA]

"(a) GENERAL RULE.—If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, *** they shall be deductible under this section, ***"

§410(a)(1)(A)(ii)

"A trust shall not constitute a qualified trust *** if the plan *** requires, as a condition of participation *** that an employee complete a period of service with the employer *** extending beyond *** the date on which he completes 1 year of service."

§411(a)(2)

"(2) EMPLOYER CONTRIBUTIONS.—A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).[*]

(A) 10-YEAR VESTING—A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) 5 to 15-YEAR VESTING—A plan satisfies the requirements of this subparagraph if an employee who

has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Years of Service	Nonforfeitable percentage
5	25
6	30
7	35
8	40
9	45
10	50
11	60
12	70
13	80
14	90
15 or more	100

(C) RULE OF 45.—

(i) A plan satisfies the requirements of this subparagraph if an employee who is not separated from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed—	and sum of age and service equals or exceeds—	then the nonforfeitable percentage is—
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100"

§412(b)(3)

"(3) CREDITS TO ACCOUNT.—For a plan year, the funding standard account shall be credited with the sum of—

(A) the amount considered contributed by the employer to or under the plan for the plan year,

(B) the amount necessary to amortize in equal annual installments (until fully amortized)—

(i) separately, with respect to each plan year, the net decrease (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years (40 plan years in the case of a multiemployer plan),

(ii) separately, with respect to each plan year, the net experience gain (if any) under the plan, over a period of 15 plan years (20 plan years in the case of a multiemployer plan), and

(iii) separately, with respect to each plan year, the net experience gain (if any) resulting from changes in actuarial assumptions used under the plan, over a period of 30 plan years,

(C) the amount of the waived funding deficiency (within the meaning of subsection (d) (3)) for the plan year, and

(D) in the case of a plan year for which the accumulated funding deficiency is determined under the funding standard account if such plan year follows a plan year for which such deficiency was determined under the alternative minimum funding standard, the excess (if any) of any debit balance in the funding standard account (determined without regard to this subparagraph) over any debit balance in the alternative minimum funding standard account."

United States Code, Title 29

§1002(19)

"For purposes of this subchapter:

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable

against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provision described in section 1053(a)(3) of this title."

§1052(a) (1) (a) (ii)

No pension plan may require, as a condition of participation in the plan, that an employee complete a period of service with the employer *** extending beyond *** the date in which he completes 1 year of service.

§1053(a)

"(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraph *** (2) of this subsection.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Years of service:	Nonforfeitable percentage
5	25
6	30
7	35
8	40
9	45

Years of Service:	Nonforfeitable percentage
10	50
11	60
12	70
13	80
14	90
15 or more	100.

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated from the service, who has completed at least five years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed—	and sum of age and service equals or exceeds—	then the nonforfeitable percentage is—
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100.

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter.

§1061(b)(2)

"(2) Except as otherwise provided in subsections (c) and (d) of this section in the case of a plan in existence on January 1, 1974, this part shall apply in the case of plans years beginning after December 31, 1975."

§1082(b)(3)

"(3) For a plan year, the funding standard account shall be credited with the sum of—

(A) the amount considered contributed by the employer to or under the plan for the plan year,

(B) the amount necessary to amortize in equal annual installments (until fully amortized)—

(i) separately, with respect to each plan year, the net decrease (if any) in unfunded past service liability under the plan arising from plan amendments adopted in such year, over a period of 30 plan years (40 plan years in the case of a multiemployer plan),

(ii) separately, with respect to each plan year, the net experience gain (if any) under the plan, over a period of 15 plan years (20 plan years in the case of a multiemployer plan), and

(iii) separately, with respect to each plan year, the net gain (if any) resulting from changes in actuarial assumptions used under the plan, over a period of 30 plan years."

§1086(b)

"(b) Except as otherwise provided in subsections (c) and (d) of this section, in the case of a plan in existence on January 1, 1974, this part shall apply in the case of plan years beginning after December 31, 1975."

§1322(a)

"(a) Subject to the limitations contained in subsection (b) of this section, the corporation shall guarantee the payment of all nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of the termination of a plan) under the terms of a plan which terminates at a time when section 1321 of this title applies to it."

§1362(b)

"(b) Any employer to which this section applies shall be liable to the corporation in an amount equal to the lesser of—

(1) the excess of—

(A) the current value of the plan's benefits guaranteed under this subchapter on the date of termination over

(B) the current value of the plan's assets allocable to such benefits on the date of termination, or

(2) 30 percent of the net worth of the employer determined as of a day, chosen by the corporation but not more than 120 days prior to the date of termination, computed without regard to any liability under this section.

§1381(a)

(a) The provisions of this subchapter take effect on September 2, 1974.

(b) Notwithstanding the provisions of subsection (a) of this section, the corporation shall pay benefits guaranteed under this subchapter with respect to any plan—

(1) which is not a multiemployer plan,

(2) which terminates after June 30, 1974, and before September 2, 1974,

(3) to which section 1321 of this title would apply if that section were effective beginning on July 1, 1974, and

(4) with respect to which a notice is filed with the Secretary of Labor and received by him not later than 10 days after September 2, 1974, except that, for reasonable cause shown, such notice may be filed with the Secretary of Labor and received by him not later than October 31, 1974, stating that the plan is a plan described in paragraphs (1), (2), and (3).

The corporation shall not pay benefits guaranteed under this subchapter with respect to a plan described in the preceding sentence unless the corporation finds substantial evidence that the plan was terminated for a reasonable business purpose and not for the purpose of obtaining the payment of benefits by the corporation under this subchapter or for the purpose of avoiding the liability

which might be imposed under subtitle D if the plan terminated on or after September 2, 1974. The provisions of subtitle D do not apply in the case of such plan which terminates before September 2, 1974. For purposes of determining whether a plan is a plan described in paragraph (2), the provisions of section 1348 of this title shall not apply, but the corporation shall make the determination on the basis of the date on which benefits ceased to accrue or on any other reasonable basis consistent with the purposes of this subsection.

Regulations:

Treas. Reg. §1.411(a)-4, 26 CFR §1.411(a)-4 (1978):

(a) **Nonforfeitability.** Certain rights in an accrued benefit must be nonforfeitable to satisfy the requirements of section 411(a). This section defines the term "nonforfeitable" for purposes of these requirements. For purposes of section 411 and the regulations thereunder, a right to an accrued benefit is considered to be nonforfeitable at a particular time if, at that time and thereafter, it is an unconditional right. Except as provided by paragraph (b) of this section, a right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause the loss of such right is a forfeitable right at that time. Certain adjustments to plan benefits such as adjustments in excess of reasonable actuarial reductions, can result in rights being forfeitable. Rights which are conditioned upon a sufficiency of plan assets in the event of a termination or partial termination are considered to be forfeitable because of such condition. However, a plan does not violate the nonforfeitability requirements merely because in the event of a termination an employee does not have any recourse toward satisfaction of his nonforfeitable benefits from other than the plan assets or the Pension Benefit Guaranty Corporation.***

29 C.F.R. §2605.6(a) (1978):

For purposes of this part, a benefit payable with respect to a participant considered to be nonforfeitable, if on the date of termination of the plan the participant (or beneficiary) has satisfied all of the conditions required

of him or her under the provisions of the plan to establish entitlement to the benefit, except the submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit that returns all or a portion of a participant's accumulated mandatory employee contributions upon his or her death.